Petition

81-1307

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHELSEA HOUSE PUBLISHERS, a division of CHELSEA HOUSE EDUCATIONAL COMMUNICATIONS, INC. and ANDREW E. NORMAN,

Petitioners,

—v.—

NICHOLSTONE BOOK BINDERY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

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Petitioners respectfully pray for a writ of certiorari to review the judgment of the Tennessee Supreme Court in this case.

QUESTIONS PRESENTED

1. Consistent with the due process clause of the Fourteenth Amendment, may a state exercise long-arm jurisdiction over a nonresident corporate defendant who had no presence within the state, never entered the state and had but a single business transaction with a company within the state initiated by a single purchase order for the printing of a book?

2. Does this Court's decision in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) require that the exercise of long-arm jurisdiction by a state be justified under the due process clause of the Fourteenth Amendment by more activity or presence by a nonresident corporation than the sending of a single purchase order for goods to a company within the state?

3. Does the signing of a personal guarantee by an individual sent to a company in the forum state to guarantee payment of a corporate obligation confer personal jurisdiction over the individual in that forum.

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DECISIONS BELOW

The decision of the Tennessee Supreme Court is unreported but is reprinted in the Appendix at A-1. The decision of the Tennessee Court of Appeals is also unreported.

JURISDICTION

The judgment of the Tennessee Supreme Court was filed on October 5, 1981. This court has jurisdiction under 28 USC §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment to U.S. Constitution: no state shall deprive any person of life, liberty or property without due process of law.

2. Tennessee Statute: T.C.A. §20-2-214 (See A-24-25below)

STATEMENT OF THE CASE

1. This case involves the recurring problem of state exercise of long-arm jurisdiction over foreign corporations who have no presence of any kind within the state, never entered the state but had a single business transaction with another company within the state. As Justice White and Justice Powell have noted, "the question of personal jurisdiction over a non-resident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts," Lakeside Bridge & Steel Co. v. Mountain State Construction Co. 445 US 907 (1980) (dissent from denial of cert.)

2. In this action plaintiff-respondent, a printer located in Nashville, Tennessee, is suing defendant petitioner, a New York City publisher, and one of its officers for the cost of printing a 1979 calendar, the "Weekly Garden Planner." Suit was brought in Davidson County Chancery Court in Tennessee, and service was made through

the Tennessee long-arm statute, T.C.A. 20-2-214. Among other defenses raised (including lateness, breach of implied and express warranties) was lack of personal jurisdiction.

3. The affidavits show that petitioners and respondent's representatives were both present at a trade meeting in Atlanta in May, 1978 and discussed possible printing jobs. Thereafter respondent sent a representative to Chelsea House in New York to solicit a bid on a specific book the "Weekly Garden Planner" a 1979 bound calendar. Chelsea House then sent a purchase order to Nicholstone's office in Tennessee to print 5,000 copies of the work. Respondent accepted the order, printed the books and sent them to New York. Andrew E. Norman, an officer of Chelsea House, guaranteed payment and arranged for a letter of credit to be issued by Morgan Guaranty Trust Co. of New York.[1/]

1/ Morgan Guaranty was one of the original parties to the action since it had dishonored the letter of credit issued to Nicholstone. Morgan Guaranty claimed that there was a variance between the documents required by the letter of credit and those presented to the bank. The Chancellor granted summary judgment to Morgan Guaranty and no appeal was taken from that decision.

4. It is undisputed that no representative of Chelsea House ever came to Tennessee. The only contacts between Chelsea House and Tennessee were (1) the sending of the purchase order for printing; (2) phone calls to Nicholstone relating to progress on the book; and (3) phone calls to a Kingsport, Tennessee company changing the color of the cover stock. Chelsea did not care where the work was done nor whether it was subcontracted out of Tennessee or not.

5. After suit was brought, Chelsea House and Norman moved to dismiss the action for lack of in personam jurisdiction, specifically relying on the Fourteenth Amendment's due process clause. On June 27, 1979, the Chancellor granted the motion to dismiss. It noted that "it must be determined whether subjecting the nonresident to forum state jurisdiction is constitutionally permissible," citing International Shoe v. State of Washington, 326 US 310 (1945). Relying on a Sixth Circuit decision, specifically dealing with the due process reach of the Tennessee long-arm statute, Southern Machine Co. v.

Mohasco Industries, Inc. 401 F.2d 374 (6th Cir. 1968), the Chancellor found that the placing of a single order for books could "not have been foreseen by the defendants to have a realistic impact on the economy of this State so as to constitute the 'purposeful availing of the privilege of transacting business.' " The Chancellor also found that "it is doubtful" that Nicholstone's cause of action arose from the activities of Chelsea House in Tennessee. Nor was the exercise of jurisdiction "reasonable"since the "transaction is a single, isolated one," not a "continuing business relationship." The Chancellor concluded that "the due process requirements insuring 'fair play and substantial justice' are not met."

6. Plaintiff Nicholstone took an appeal to the Court of Appeals which on February 29, 1980 affirmed the decision of the Chancellor. It quoted extensively from his opinion and concluded that he "reached the correct conclusion." Thus the decision was again based on the federal

constitutional grounds of due process, as laid out in International Shoe.

7. The Tennessee Supreme Court reversed. Again citing Mohasco it found that Chelsea House did avail itself of the privilege of transacting business in Tennessee by the sending of the purchase order into the state and seeking "to secure goods from a manufacturer and seller located within the forum." (A-9). The Tennessee Supreme Court distinguished this Court's decisions in Kulko v. Superior Court of California, 436 US 84 (1978) and World-Wide Volkswagen Corp. v. Woodson, 444 US 286 (1980) finding that there was not sufficient "foreseeability" of contacts with the forum state to sustain long-arm jurisdiction in those cases. However here it "was foreseeable that economic consequences would occur in Tennessee flowing from this business transaction." (A- 14). It relied on the fact that the object of the contract was "a customized product involving the manufacturer of specialized goods." (A-13-14).

It held that "Tennessee clearly has an interest in protecting its residents against a breach of contract by nonresidents for purchase of goods made in this state."

8. The federal question of the conflict between the due process clause and the exercise of long-arm jurisdiction by the state was raised by the filing of the initial motion to dismiss and has been preserved and asserted through all levels of the Tennessee court system.

REASONS FOR GRANTING THE PETITION

The decision of the Tennessee Supreme Court is in conflict with other State Courts and federal courts regarding the question of personal jurisdiction over nonresident corporate defendants based on contractual dealings with the forum state and the deep division on this question should be resolved.

The Tennessee Supreme Court acknowledged the deep division among state and federal courts on the question of personal jurisdiction in the setting of a single business transaction:

> It is an understatement to say that there are numerous cases discussing in personam jurisdiction in the setting of a single business transaction. In Lakeside Bridge & Steel v. Mountain State Const. Co., 597 F.2d 596 cert. denied 445 US 907 (1980), Justice White, dissenting from the denial of a writ of certiorari, noted that "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts." He regrets that the Supreme Court refused to offer any clear guidance on this important problem. (A17-18).

In the Lakeside case itself, on almost identical facts the Seventh Circuit found no personal jurisdiction existed in the forum state. In that case a West Virginia company ordered specially made structural assemblies from a company in Wisconsin. The seller visited the buyers office in West Virginia, just as Nicholstone visited Chelsea here. A purchase order was sent from the buyer to the seller, just as here. The goods were manufactured in Wisconsin and sent to buyer's project site, just as here. But the Seventh Circuit found no purposeful availing of the privilege of conducting activities within the forum state and therefore no basis for long-arm jurisdiction.

Justice White (joined by Justice Powell) dissented from the denial of certiorari as noted above. He cited 24 cases split on the specific issue and noted:

> The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in different States. The disarray among federal and state courts

> noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question. I would grant the petition in order to address this important problem.

Since those words were written still other decisions have been rendered again splitting on the issue discussed. See e.g., Taubler v. Giraud, 655 F.2d 991 (9th Cir. 1981)(personal jurisdiction found); Bankhead Enterprises, Inc. v. Norfolk & Western Railway Co., 642 F.2d 802 (5th Cir. 1981)(personal jurisdiction found). Other decisions are contrary: Nu-Way Systems v. Belmont Marketing, 635 F.2d 617 (7th Cir. 1980) (no personal jurisdiction); Prejean v. Sonatrack, Inc., 652 F.2d 1260 (5th Cir. 1981)(no personal jurisdiction); Craig v. General Finance Corp. of Illinois, 504 F. Supp. 1033 (D. Md. 1981) (no personal jurisdiction); Cascade Corp. v. Hiab-Foco AB, 619 F.2d 36 (9th Cir. 1980)(no personal jurisdiction); Premier Corp. v. Newsom, 620 F.2d 219 (10th Cir. 1980)(no personal jurisdiction).

Thus state and federal courts are hopelessly split on an important commercial issue that recurs time and time again. Indeed the products liability issue addressed in World-Wide Volkswagen or the custody matter at issue in Kulko are far less common than the contractual issue presented in the instant case. Thousands of times every day companies may order products to be manufactured for them in another state. Is that sufficient to confer long-arm jurisdiction in that forum?

This Court has not addressed that specific problem and its prior cases have not offered sufficient guidance on the issue. Certiorari should be granted to address that problem.

The Tennessee Court's decision is contrary to the principles of World-Wide Volkswagen v. Woodson

The situation presented here is the converse of that involved in World-Wide Volkswagen, supra. In that case the issue was whether the sale of a chattel was sufficient to confer per-

sonal jurisdiction over the seller wherever the chattel moved. This Court rejected that proposition, 444 US at 296.

Here the question is: is the buyer if a chattel subject to long-arm jurisdiction wherever any part of the chattel is made. The same principles that were laid down in World-Wide Volkswagen should apply here as well. This Court noted:

> The Due Process Clause, by ensuring the "orderly administration of the laws," International Shoe Co. v. Washington, 326 US, at 319, 90 L Ed. 95 66 S Ct 154, 161 ALR 1057, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> 444 US at 297

It added:

> ...financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. See Kulko v. California Superior Court, 436 US at 94-95, 56 L Ed 2d 132, 98 S Ct 1690. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable

> of use in Oklahoma is far too attenuated a contact to justify that State's exercise of in personam jurisdiction over them.

Here there was no "availing" of the privilege of doing business in Tennessee. Chelsea House did not care where its books were made, nor whether parts of the printing were subcontracted out or not. If the binding were done in one state, the printing in another and the cloth for the book manufactured in a third state, all three forums could not assert jurisdiction. Its contacts with Tennessee are not sufficient to justify exercise of long-arm jurisdiction here.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

NICHOLSTONE BOOK BINDERY, INC.	:	Permission to Appeal From the
Plaintiff-Appellant,	:	Court of Appeals Granted
V.	:	
CHELSEA HOUSE PUBLISHERS, et al.,	:	Appeal From the Chancery Court for Davidson
Defendants-Appellees	:	County
		Hon. Robert S. Brandt, Chancellor

For Plaintiff-Appellant:	For Defendants-Appellees:
O.B. Hofstetter, Jr. Hofstetter & Hofstetter Nashville	James F. Sanders Neal & Harwell Nashville

O P I N I O N

REVERSED & REMANDED. BROCK, J.

The principal question here is whether there are sufficient "minimum contacts" to confer in personam long-arm jurisdiction over the defendant foreign corporation which has conducted a single business transaction with the plaintiff, a Tennessee corporation.

Plaintiff, a Tennessee book binder, filed suit in Davidson County Chancery Court against Chelsea, a New York publishing house, alleging the defendant's failure to make payment for printing and binding done in Tennessee by plaintiff and shipped to defendant in New York. Defendant filed a Rule 12.02(2), T.R.C.P., motion to dismiss for lack of in personam jurisdiction. The Chancellor held a hearing on the motion, treated it as a Rule 56 motion for summary judgment, after considering affidavits presented by both parties, and sustained the motion for summary judgment.[1] The Court of

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1 / It was error for the courts below to treat defendant's motion to dismiss under Rule 12.02 (2), T.R.C.P., as a Rule 56 motion for summary judgment. In 6 Moore, Federal Practice (Part 2) ¶ 56.17[36] at 913 (1980), the author states

(continued on next page)

Appeals affirmed, holding that the Tennessee Long-Arm Statute, T.C.A., §20-235 (now T.C.A., § 20-2-214),[2] and the constitutional limitations of the Fourteenth Amendment's due process clause, would not permit jurisdiction under the facts presented.

(footnote 1 continued)
succinctly that the"summary judgment procedure does not properly apply to jurisdictional issues." He explains in ¶56.03 at pp. 55-56 that the motion to dismiss for lack of jurisdiction is a motion in abatement, as opposed to the motion for summary judgment, which is a motion in bar and goes to the merits of the action. Thus, only where the 12.02(2) motion is treated as a motion on the merits may it be handled as a Rule 56 motion. The author does observe, however, that motions to dismiss under the corresponding federal rule, Rule 12 (b)(2), have been treated as summary judgment proceedings. See ACS Industries, Inc. v. Keller Industries, Inc., 296 F.Supp. 1160 (D. Conn. 1969). But this is not the preferred procedure. United Dairy Farmers Coop. Assn. v. Milk Control Comm., 47 F.R.D. 1 (W.D.Pa. 1969). However, this error was harmless, considering the disposition of the merits that we make infra.

2 / See Appendix.

The pleadings and affidavits show that plaintiff's and defendant's representatives were both present at a trade meeting in Atlanta in May, 1978. None of the affidavits makes it clear who initiated negotiations. After the meeting, plaintiff sent a representative to discuss the job with defendants in New York which led to plaintiff placing bids for certain printing work. Defendant then sent a purchase order to plaintiff's office in Tennessee, for the printing and binding of 5,000 copies of a 120-page document entitled the "Weekly Garden Planner," a 1979 calendar. Thereafter, negotiations by phone and mail resulted in plaintiff's acceptance of the order, and Morgan Guaranty Trust of New York issued a letter of credit for $14,592.90 to guarantee the amount of the contract.

In order to fulfill its obligations under the agrement, plaintiff (1) ordered paper for the document from a Nashville firm; (2) had color plates made by a Goodlettsville,

Tennessee, firm; (3) ordered specified cover stock from a Kingsport firm; (4) ordered stamping dies to be made by a Nashville firm; (5) purchased individual mailing cartons from a container firm in Franklin, Kentucky; (6) and purchased 5,000 vinyl pockets from a Nashville firm. While these steps were proceeding, the defendant itself contacted the Kingsport firm and changed the color of the cover stock.

On November 30, 1978, the merchandise was shipped to defendant in New York, but technicalities involving the letter of credit (irrelevant to the decision here) resulted in nonpayment and, eventually, this lawsuit.

A significant decision dealing with the Tennessee "long-arm" statute is Southern Machine Company, Inc. v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968), which involves a Tennessee corporation's suit against a foreign corporation. In Mohasco, the court recognized that the broadly-phrased considerations as established in International Shoe Co. v.

Washington, 326 US 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). International Shoe held that "traditional notions of fair play and substantial justice" can be protected only if the foreign defendant has certain "minimum contacts" with the forum state.

Mohasco attempted to synthesize the rules announced in International Shoe and the subsequent decisions, McGee v. International Life Insurance Co., 355 US 220, 78 S. Ct. 199, 2 L.Ed.2d 223 (1957) and Hanson v. Denckla, 357 US 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), into a "three-part test" to determine whether sufficient minimum contacts exist:

> ". . . [T]hree criteria emerge for determining the present outerlimits of in personam jurisdiction based on a single act. First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of juris-

diction over the defendant reasonable."

401 F.2d at 381.[3]

Though Mohasco was the first case to fully analyze Tennessee's long-arm statute, the first state case to do so was Darby v. Superior Supply Co., 458 S.W.2d 423 (Tenn. 1970). That case involved the purchase of mahogany lumber by an Alabama individual, from the plaintiff, a Tennessee supply firm in Chattanooga. The order was placed by telephone and the plaintiff filled the order from available stock. A servant of the defendant took delivery of the lumber in Tennessee. Darby later refused to pay for the lumber and Superior sued for payment due. The Darby majority seemed to be impressed by the following factors in finding a failure of jurisdiction: (1) that the defendant,

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3 / The Mohasco analysis has recently been applied incases such as Poyner v. Erma Werke GMBH, 618 F.2d 1186 (6th Cir. 1980); Gaston v. Aquaslide 'N' Dive Corp. 487 F. Supp. 16 (E.D. Tenn. 1980); Warren v. Dynamics Health Equipment Mfg. Co., Inc., 483 F.Supp. 788, 790 (N.D. Tenn. 1980); Carborundum Co. v. Bay Fabricators, Inc., 461 F. Supp. 437 (E.D. Tenn. 1978).

an individual, entered the forum state only through his servant, the driver of the truck which hauled the lumber away; (2) that the transaction was a retail purchase by an individual involving only the "modest amount" of $3,639.48; and (3) that filling defendant's order required "no special manufacturing operations in Tennessee." Id. at 426.

The Chancellor, Court of Appeals and defendant all rely heavily upon the Darby decision. But Darby, a 4-1 decision, has been criticized by legal commentators. In Comment, "Jurisdiction Over Foreign Corporations in Tennessee," 42 Tenn. L. Rev. 325 (1975), the author cites authority describing Darby as an "unduly restrictive interpretation of due process and federal decisions." Id. at 339. See also, William W. Bond, Jr. & A., Inc., v. Montego Bay Dev. Corp., 405 F. Supp. 256 (W.D. Tenn. 1975), especially n. 4 at 259. The Comment also points out that the Darby decision made reference to the fact that had

Darby decision made reference to the fact that had Darby been a corporation rather than an individual, the result may have been different. See, Darby v. Superior Supply Co., supra at 425-6, discussing Olberling v. Illinois Central Railroad Co., 346 US 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953). Darby should not be deemed to be authority beyond the particular facts there considered. In our view, it did not sanction the assertion of jurisdiction under our "long arm" statute to the maximum extent permitted by the Fourteenth Amendment, which is the declared intent of our General Assembly.

To determine whether Chelsea purposefully availed itself of the privilege of transacting business in Tennessee, there are certain matters addressed which are immaterial to the outcome. Mohasco specifically held that the physical presence of the defendant or its agent in the forum state is "not necessary" for the transaction of business to serve as a minimum contact. See also Good Hope Industries v. Ryder Scott Co., Mass., 389 NE2d 76 (1979).

Nor is it material that defendant did not solicit the business or that the contract was executed in the foreign state. 401 F.2d at 382. Similarly, the determination of which party initiated the business transaction is irrelevant. Representatives of both parties met at a Booksellers Convention in Atlanta where they first discussed the possibility of plaintiff Nicholstone doing some business with defendant Chelsea House. It is not clear from the record who solicited whom first. However, as noted in Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977) the determination as to who made the initial solicitation is not a decisive factor. The crucial factor is that the subsequent conduct of the defendant shows that it purposefully availed itself of the privilege of carrying on activities to secure goods from a manufacturer and seller located within the forum. Likewise, technicalities of the execution of the contract cannot change the business realities of the transaction.

As pointed out in Mohasco, citing and quoting from Shealy v. Challenger Manufacturing Co., 304 F.2d 102 (4th Cir. 1962), the significant point is that defendant did choose to do business with plaintiff, and it cannot diminish the purposefulness of that choice that defendant was fortunate enough to take advantage of plaintiff's low bid, even if accomplished without active solicitation. 401 F.2d at 382. It is clear, therefore, that the business transaction was beneficial to both parties, and that though plaintiff placed bids for the work and sent a salesman to discuss details with defendant in New York, the transaction began as a result of a purchase order having been sent by defendant to plaintiff in Tennessee.

The Supreme Court has dealt with the application of a state long arm statute and the corresponding exercise in personam jurisdiction over a nonresident defendant in several recent decisions. In Kulko v. Superior Court of California, 436 US 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978), in which the court

denied personal jurisdiction over the non-resident defendant father in an action for child support, the court reiterated that an essential criterion in all such cases is whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in the forum state. The court held that a father who agrees in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws. Since the separation agreement had virtually no connection with the forum state, in weighing the facts, the court held that California was not a "fair forum." Although Kulko applied the "minimum contacts" test of International Shoe to determine that the requisite "affiliating circumstances" of Hanson were not present, the court did so in a non-commercial context

involving two individuals.

World-Wide Volkswagen Corp. v. Woodson, 444 US 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) is a products liability suit in which the respondents, the Robinsons, purchased a new Audi automobile from a Volkswagen dealer in New York and brought suit in Oklahoma against the manufacturer, the importer, regional distributor and retail dealer for damages sustained in an Oklahoma accident. While driving through Oklahoma on the way to their new home in Arizona, another car struck their Audi in the rear, causing a fire which severely burned Kay Robinson and her two children. The court noted the apparent paucity of contacts between the defendant and Oklahoma, and that the contacts were far too attenuated to justify the exericse of Oklahoma's in personam jurisdiction over the defendant. In reaching that conclusion, the court noted that the defendants did not avail themselves of any of the privileges of Oklahoma law. It is unreasonable to base jurisdiction on one, iso-

lated occurrence that a single automobile sold in New York to New York residents happened to suffer an accident while passing through Oklahome. In response to the claim that an automobile is mobile and, therefore, by its very design and purpose it was "foreseeable" that such an injury could occur in Oklahoma, the court noted that such "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the due process clause.

> "But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."
>
> 100 S. Ct. at 567.

In applying the World-Wide test of foreseeability to the facts in the instant case, it is important to observe that defendant entered into an agreement which provided for a customized product including

the manufacture of specialized goods such as color plates, stamping dies, cover stock, from three other Tennessee companies and the purchase of specialized items such as paper, mailing cartons and vinyl pockets from two other Tennessee firms and a Kentucky firm. Moreover, defendant dealt directly with at least one of plaintiff's subcontractors in Tennessee, the cover stock firm in Kingsport. It was foreseeable that economic consequences would occur in Tennessee flowing from this business transaction. Therefore, it is difficult to conceive of defendant not having foreseen the possibility of its being haled into a Tennessee court upon refusal to pay for the manufactured products.

It should be noted that one of the ingredients of jurisdiction missing in Darby, the presence of a "special manufacturing operation," is found in this case. These custom-made bindings and casings were not simply taken from stock, as was the lumber in Darby. This point is considered in Gardner Engineering Corp. v. Page Engineering Co., 484 F.2d 28 (8th Cir. 1973), where jurisdiction was permitted to

reach into Illinois from Arkansas. Involved was defendant's contract to fabricate certain customized items for the construction of a bridge in Arkansas by plaintiffs. The court found an important "contact" in that the forum state was the place of performance of a customized contract. Id. at 32.

The other two parts of the Mohasco test follow as a matter of course. It is clear that the cause of action here arose from the business transacted in Tennessee, i.e., no cause of action would have arisen had plaintiff not manufactured the products in question. The second part of the Mohasco test is satisfied when it can be shown that "many of the operative facts" of the controversy arose from the contract "and from acts performed under that agreement." 401 F.2d at 384.

> "Mohasco's participation in establishing those obligations and in setting in motion that performance is clear."
>
> Id.

As to the final part of the Mohasco test, whether it is reasonable to require

Chelsea to defend in Tennessee, Mohasco held that ultimately, that question "must depend upon a determination of whether Tennessee has an interest in resolving the conflict at issue." Id. at 384. Having stated the question, Mohasco answered:

> "[W]hen the contract is with a resident of Tennessee, the State's interest in resolving a suit based on the contract and brought by that resident cannot be doubted."
>
> Id. at 385.

Tennessee clearly has an interest in protecting its residents against a breach of contract by nonresidents for purchase of goods made in this state. The transaction in this case indicates that it would not offend "traditional notions of fair play and substantial justice" to settle this dispute in Tennessee. Poyner v. Erma Werke GMBH, 618 F.2d 1186, 1191 (6th Cir. 1980).

Finally, we balance this interest of the State against the defendant's burden of defending himself in the forum state. See, e.g., Gardner Engineering Corp. v. Page Engineering Co.,

supra, 484 F.2d at 31. In Poyner v. Erma Werke GMBH, supra, Judge Phillips makes the point that the same conditions of modern technology which have made interstate business transactions flourish serve also to ease the burden of defending in a foreign forum:

> "As recognized in both the majority and dissenting opinions in World-Wide Volkswagen, supra, modern transportation and communication have facilitated this process, greatly increasing the amount of business conducted across sovereign boundaries. See also McGee, supra. As recognized in McGee this growth in markets, transportation and communication, in effect, have also made it much less burdensome for a party to defend himself in a state where he engages in economic activity."
>
> 618 F.2d at 1192.

In this case, it does not appear that trial in Tennessee would be unfair or burdensome to either party.

It is an understatement to say that there are numerous cases discussing in personam jurisdiction in the setting of a single business transaction. In Lakeside Bridge & Steel v. Mountain State Const. Co., 597 F.2d 596 cert. denied 445 US 907 (1980, Justice White, dissenting

from the denial of a writ of certiorari, noted that "the question of personal jurisdiction over a non-resident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts." He regrets that the Supreme Court refused to offer any clear guidance on this important problem.

One, however, finds support for our current position in a vast array of sources. In Colony Press Inc. v. Fleeman, 17 Ill. App. 3d 14, 308 NE2d 78 (1974) an Ohio corporate defendant, by placing a single interstate telephone order, satisfied the "minimum contact: requirements of the due process clause because the defendant voluntarily entered into a business transaction with an Illinois plaintiff. In Product Promoters, Inc. v. Cousteau, 495 F.2d 483, 494-499 (5th Cir. 1974), a breach of contract suit in which the court held that minimum contacts were sufficient, the court reasoned that neither the defendant nor the defendant's agents need by physically present within the state so long as the defendant's contact with the

forum was deliberate and not fortuitous. See also, Good Hope Industries v. Ryder Scott Co., supra; cf. World-Wide Volkswagen, supra at 8. The Wisconsin Supreme Court in Zerbel v. H.L. Federman & Co., 48 Wis.2d 54, 179 NW2d 872 (1970) held that when a non-resident defendant contracted for services, i.e. the preparation of a financial report, which would be performed in part in Wisconsin, the defendant purposefully availed himself of the privilege of conducting activities in Wisconsin.

Proctor & Schwartz, Inc. v. Cleveland Lumber Co., 228 Pa. Super. 12, 323 A.2d 11 (1974) seems closely analogous to the instant case. A Pennsylvania corporate seller brought suit against a Georgia corporate buyer to recover the balance due on the purchase price of specially ordered lumber drying equipment and related materials. Alleging certain defects in the manufacture of the goods purchased, the defendant refused to make further payments. As in the instant case, defendant maintained no offices, no interest in any real or personal property, no

agents or representatives, nor any business contacts within the forum. The Pennsylvania "long-arm" statute, as does that of Tennessee, provides for the exercise of full constitutional power over foreign corporations. The Cleveland court adopted the Mohasco tripartite analysis to determine that the requisite "minimum contacts" were present for the exercise of in personam jurisdiction. In examining the nature of defendant's conduct, the court noted that it was not a passive purchaser which blandly submitted to the mandates of a foreign seller. Rather the defendant conducted extensive and active negotiations with the plaintiff. Relying upon In-Flight Devices Corp. v. Van Dusen Air, Inc. 466 F.2d 220, 233 (6th Cir. 1972) the court stated that "[t]o the extent the buyer vigorously negotiates. . . and . . . departs from the passive buyer role it would seem that any unfairness which would normally be associated with the exercise of long-arm jurisdiction over him disappears." The defendant should

reasonably have anticipated that a failure to make the installment payments on its obligation would have consequences within the forum state and could result in its being called to defend itself in the state whose laws governed the contract.

William W. Bond, Jr. & A., Inc. v. Montego Bay Dev. Corp., supra, is persuasive on the facts. In Bond, the plaintiff, a Tennessee corporation, entered into a contract with a Maryland corporation to prepare architectural, mechanical, electrical, and structural plans for a Holiday Inn to be built in Maryland. Defendant solicited the job. The contract was executed in Maryland. Applying the Mohasco test, the court found that defendant has purpsoely availed itself of the privilege of doing business in Tennessee because it was "necessarily foreseeable to the parties that at least a substantial part of the services plaintiff was to provide would be performed . . . in Tennessee." Id. at 259. Citing Mohasco, the court noted that it

was not controlling that no representative of defendant ever came to Tennessee in connection with the deal. Id. It summarized:

> "Here, a business transaction set in motion by defendants had a realistic, foreseeable and considerable impact on commerce in Tennessee."
>
> Id.

Likewise, the court found that the cuase of action arose from the transaction because the operative facts of the controversy were related to the defendant's contact with Tennessee. And, finally, the court found that it would be reasonable to require defendant to defend in Tennessee:

> "The interest of Tennessee here is to resolve a contract dispute brought a resident to recover the alleged benefit of his bargain. Even a one-shot contract, if substantial enough in its effect on Tennessee commerce, appears to be a potentially sufficient contact with the forum state under Sixth Circuit standards."
>
> 405 F.Supp. 260.

We conclude that the plaintiff here brought suit in the proper forum within the due process guidelines set forth in the cases dis-

cussed. The decision of the Court of Appeals is reversed and this cause is remanded to the trial court for further appropriate proceedings. Costs are taxed against the appellees.

APPENDIX

T.C.A. § 20-2-214:

"Jurisdiction of persons unavailable to personal service in state - Classes of actions to which applicable. (a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:

"(1) The transaction of any business within the state;

"(2) Any tortious act or omission within this state;

"(3) The ownership or possession of any interest in property located within this state;

"(4) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this state at the time of contracting;

"(5) Entering into a contract for services to be rendered or for materials to be furnished in this state;

"(6) Any basis not inconsistent with the constitution of this state or of the United States;

"(7) Any action of divorce, annulment or separate maintenance where the parties lived in the marital relationship within this state, notwithstanding one party's subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or property

settlement, if the other party to the marital relationship continues to reside in this state.

"(b) 'Person' as used herein shall include corporations and all other entities which would be subject to service of process if present in this state.

"(c) Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative."

Opposition

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No. 81-1307

In the Supreme Court of the United States

October Term, 1981

CHELSEA HOUSE PUBLISHERS, a division of CHELSEA HOUSE EDUCATIONAL COMMUNICATIONS, INC. and ANDREW E. NORMAN,
Petitioners,

vs.

NICHOLSTONE BOOK BINDERY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF FOR THE RESPONDENT

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DESIGNATION OF CORPORATE RELATIONSHIPS

Nicholstone Book Bindery, Inc., filing this Brief in Opposition to Petition for Writ of Certiorari, states that it is a corporation which does its binding business in Nashville, Davidson County, Tennessee. The only possible affiliates of Nicholstone are Looseleaf, Inc. and Music City Album Co., Inc., both Tennessee corporations which also perform their business activities in Nashville, Davidson County, Tennessee. Due to limited discovery, respondent is unable to state either the identities of the subsidiaries and affiliates of Chelsea House Publishers or the extent of their possible activities in Tennessee.

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DECISIONS BELOW

The decision of the Tennessee Supreme Court is reported at *Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, et al.*, 621 SW2d 560. The decision of the Court of Appeals of Tennessee is unreported.

COUNTER-STATEMENT OF THE CASE

1. This case involves the problem of the exercise of long-arm jurisdiction over foreign corporations who have engaged in a single business transaction with a company located in the forum state. Because of limited discovery, the extent of the other activities within the forum state by the foreign corporation involved in the instant case are not considered.

2. In this action, plaintiff-respondent, a bindery located in Nashville, Tennessee, sued defendant-petitioner, a New York City publisher, and one of its officers for $14,592.90, the cost of printing and binding a 1979 calendar, the "Weekly Garden Planner," plus attorney's fees. In response, the petitioners filed a motion to dismiss predicated upon a lack of personal jurisdiction. Contrary to the statements of the petitioners, no affirmative defenses, which must be raised by answer, have been plead by them.

3. The affidavits show that petitioner's and respondent's representatives were both present at a trade meeting in Atlanta in May, 1978 and discussed possible printing jobs. Thereafter, respondent sent a representative to Chelsea House in New York to solicit a bid on a specific book, the "Weekly Garden Planner," a 1979 bound calendar. Chelsea House then sent a purchase order to Nicholstone's office in Tennessee to print 5,000 copies of the work, and respondent accepted the order. As a portion of the consideration for respondent accepting the purchase order, Andrew E. Norman, an officer of Chelsea House, guaranteed payment and arranged for a letter of credit to be issued by Morgan Guaranty Trust Co. of New York.

4. After the bid had been accepted by the respondent in Tennessee, the petitioner sent to respondent a "camera copy" of the document or book to be prepared

and/or manufactured by respondent. Thereafter, in order to fulfill its contract with Chelsea House, Nicholstone took the following steps:

(a) It ordered the paper upon which the document was to be printed from Cordage of Nashville, 2919 Sidco Drive, Nashville, Tennessee;

(b) It sent the camera copy to Color Graphics, 305 Church Street, Goodlettsville, Tennessee, to be printed. Color Graphics thereupon made the necessary plates to accomplish the job;

(c) It ordered specified cover stock for binding from Hollister Mills, Kingsport, Tennessee;

(d) It ordered stamping dies from Dixie Electrotype Co., Inc., 421 Commerce Street, Nashville, Tennessee;

(e) It ordered and purchased individual mailing cartons from Southern Container Corporation, Franklin, Kentucky; and

(f) It ordered and purchased 5,000 vinyl pockets from Looseleaf, Inc., 418 Harding Industrial Drive, Nashville, Tennessee.

Subsequently, the petitioner Chelsea House changed the color of the cover stock by making direct contact with Hollister Mills, Kingsport, Tennessee. After the new cover stock and the printed pages were delivered to the respondent, it bound them pursuant to its agreement with the petitioner. All of the work performed by the respondent pursuant to the parties' contract took place at its plant in Davidson County, Tennessee.

The record is silent as to Chelsea House's preference as to where the work was to be performed; however, as evidenced by its direct contact with the firm in Kingsport,

Tennessee, the petitioner clearly knew where the work was being performed in Tennessee.

The merchandise was shipped to and accepted by the petitioner Chelsea House, but it has failed and/or refused to pay for same.

5. After suit was brought, Chelsea House and Norman moved to dismiss the action for lack of *in personam* jurisdiction, specifically relying on the Fourteenth Amendment's Due Process Clause. On June 27, 1979, the Chancellor granted the motion to dismiss. He noted that "it must be determined whether subjecting the nonresident to forum state jurisdiction is constitutionally permissible," citing *International Shoe v. State of Washington,* 326 US 310 (1945).

Relying on a Sixth Circuit decision, specifically dealing with the due process reach of the Tennessee long-arm statute, *Southern Machine Company, Inc. v. Mohasco Industries, Inc.,* 401 F2d 374 (6th Cir., 1968), the Chancellor found that the placing of a single order for books could "not have been foreseen by the defendants to have a realistic impact on the economy of this State so as to constitute the 'purposeful availing of the privilege of transacting business.'" The Chancellor also found that "it is doubtful" that Nicholstone's cause of action arose from the activities of Chelsea House in Tennessee. Nor was the exercise of jurisdiction "reasonable" since the "transaction is a single, isolated one," not a "continuing business relationship." The Chancellor concluded that "the due process requirements insuring 'fair play and substantial justice' are not met."

6. Respondent Nicholstone took an appeal to the Court of Appeals which, on February 29, 1980, affirmed the decision of the Chancellor. It quoted extensively from his opinion and concluded that he "reached the correct con-

clusion." Thus the decision was again based on the federal constitutional grounds of due process, as laid out in *International Shoe.*

7. The Tennessee Supreme Court reversed. Again citing *Mohasco* it found that Chelsea House did avail itself of the privilege of transacting business in Tennessee by the sending of the purchase order into the state and seeking "to secure goods from a manufacturer and seller located within the forum." 621 SW2d at 563 The Tennessee Supreme Court utilized this Court's decisions in *Kulko v. Superior Court of California,* 436 US 84 (1978) and *World-Wide Volkswagen Corp. v. Woodson,* 444 US 286 (1980) and found that there was sufficient "foreseeability" of contacts with the forum state to sustain long-arm jurisdiction in the instant case. In the opinion of the Court, it "was foreseeable that economic consequences would occur in Tennessee flowing from this business transaction." 621 SW2d at 563 It relied on the fact that the object of the contract was "a customized product involving the manufacturer of specialized goods." Id. It held that "Tennessee clearly has an interest in protecting its residents against a breach of contract by nonresidents for purchase of goods made in this state." Id.

8. The federal question of the conflict between the Due Process Clause and the exercise of long-arm jurisdiction by the state was raised by the filing of the initial motion to dismiss and has been preserved and asserted through all levels of the Tennessee court system.

SUMMARY OF ARGUMENT

The decision below was consistent with the body of law that has evolved to determine whether or not a nonresident defendant has sufficient "minimum contacts" with the forum state.

ARGUMENT

The legal principles which govern the decision here are the result of constant changes both in the state and federal courts.

Petitioner seeks to have this case reviewed because it contends that the decision of the Tennessee Supreme Court is in conflict with other state courts and federal courts regarding the question of personal jurisdiction over nonresident corporate defendants, and because an alleged "deep division" of the decisions in this area should be resolved. Simply stated, petitioner is of the opinion that the United States Supreme Court can establish a test to answer the above stated problem. Petitioner chooses to forget that law is not an exact science and, therefore, as the facts of each case differ, it is legally impossible to arrive at a final and ultimate solution which will anticipate all future problems and factual situations.

Petitioner would implore this Court to retreat to the conceptual structure found in the case of *Pennoyer v. Neff*, 95 US 714, 24 LEd 565 (1877), which stated that "no State can exercise direct jurisdiction and authority over persons or property without its territory." Id. at 95 US 722

In the case of *International Shoe v. State of Washington*, 326 US 310, 66 SCt 154, 90 LEd 95 (1945), the Court stated, at page 316, that:

> "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

In the case of *McGee v. International Life Insurance Co.*, 355 US 220, 78 SCt 199, 2 LEd 2d 223 (1957), the Court found that but a single contact, therein the issuance of a life insurance policy to a California resident, to be the sufficient "minimum contact" required under the Fourteenth Amendment.

In the case of *Hanson v. Denkla*, 357 US 220, 78 SCt 129, 2 LEd 2d 223 (1957), the Court stated that:

> "The application of that Rule (*International Shoe*) will vary with the *quality and nature of the defendant's activity*..." (Emphasis suplied)

Thus it is apparent that no mechanical rule can be created which can be followed with commendable precision. Rather, all jurisdictional questions require a realistic, case by case, approach. See: *In Flight Devices v. Van Dusen Air, Inc.*, 466 F2d 220 (6th Cir., 1972). Simply stated, the Court cannot establish a formula or a simplistic rule of thumb. *O'Hare International Bank v. Hampton*, 437 F2d 1173 (7th Cir., 1971).

One test, which is sufficiently flexible to meet the facts and circumstances of each case, is found in the case of *Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F2d 374, 381 (6th Cir., 1968), which states that:

> "First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." 401 F2d at page 381.

Petitioner's brief clearly reveals that the Tennessee Supreme Court applied the *Mohasco* test to the facts and circumstances of this particular case and concluded that the exercise of jurisdiction was reasonable.

The most recently formulated test is the "foreseeability test" which was adopted by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 100 SCt 559, 62 LEd 2d 490 (1980), and defined as follows:

> "But the foreseeability that it is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 100 SCt at 567.

With reference to the "foreseeability test," Justice Brock, speaking for the Tennessee Supreme Court in the instant case, stated that:

> "In applying the *World-Wide* test of foreseeability to the facts in the instant case, it is important to observe that defendant entered into an agreement which provided for a customized product including the manufacture of specialized goods such as color plates, stamping dies, cover stock, from three other Tennessee companies and the purchase of specialized items such as paper, mailing cartons and vinyl pockets from two other Tennessee firms and a Kentucky firm. Moreover, defendant dealt directly with at least one of plaintiff's subcontractors in Tennessee, the cover stock firm in Kingsport. It was foreseeable that economic consequences would occur in Tennessee flowing from this business transaction. Therefore, it is difficult to conceive of defendant not having foreseen the possibility of its being haled into a Tennessee court upon refusal to pay for the manufactured products."

Petitioner cites the dissenting opinion of Justice White in the denial of certiorari in the case of *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 445 US 907, 100 SCt 1087 (1980), and the cases cited therein. A close reading of cases cited by Justice White upholding jurisdiction reveals certain pertinent facts which are similar to those found in the instant case. In the case of *Products Promotions Inc. v. Cousteau*, 495 F2d 483 (5th Cir., 1974), the nonresident defendant's contacts with the forum were deliberate, not merely fortuitous. In the case of *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F2d 933 (10th Cir., 1977), the initial contact was not decisive. Rather, the Court looked to the subsequent conduct of the defendant. In the case of *In Flight Devices v. Van Dusen Air, Inc.*, 466 F2d 220 (6th Cir., 1972), the nonresident defendant, through his activities in the forum state, departed from the passive buyer role.

To be complete, Justice White cited numerous cases denying jurisdiction. In one, the case of *E. R. Callender Printing Co. v. District Court*, 182 Colo. 25, 510 P2d 889 (1973) (en banc) (construing state law), the defendants' only contact with the forum state was a purchase order. Unlike the petitioner in the instant case who made direct contact with Tennessee firms, the defendant in *Callender* was a passive buyer. In effect, a defendant's activity must provide the basis for jurisdiction. See: *Republic International Corp. v. Amco Engineers, Inc.*, 516 F2d 161, 167 (9th Cir., 1975).

Respondent therefore submits that as the facts of each case necessarily vary, petitioner's prayer for a simplistic, rule of thumb, test for all situations must be disregarded, unless the Court desires to retreat into the theory enunciated in the case of *Pennoyer v. Neff*, 95 US 714, 24 LEd 565 (1877).

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing that there are special and important reasons why the writ should be granted. Petitioner desires this Court to create an inflexible test to determine jurisdiction, ignoring the problem that every jurisdictional question depends upon the peculiar facts in the record before each Court. Respondent submits that sufficient jurisdictional "tests," which can be applied to each particular factual situation, have been formulated and adopted by this Court. Applying these flexible tests, the Tennessee Supreme Court correctly concluded that the exercise of long-arm jurisdiction in the instant case was within the scope of the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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